SERVED: October 20, 1993

NTSB Order No. EA-4004

UNITED STATES OF AMERICA NATIONAL TRANSPORTATION SAFETY BOARD WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD at its office in Washington, D.C. on the 19th day of October, 1993

DAVID R. HINSON, Administrator, Federal Aviation Administration,

Complainant,

v.

RAYMOND J. MEUNIER,

Respondent.

Docket SE-13283

ORDER DISMISSING APPEAL

The Administrator has moved to dismiss the respondent's appeal in this proceeding because it was not, as required by Section 821.57(b) of the Board's rules of practice, 49 CFR Part 821, perfected by the timely filing of an appeal brief. We will

¹Section 821.57(b) provides, in relevant part, as follows:

[&]quot;§821.57 Procedure on appeal.

⁽b) Briefs and oral argument. Within 5 days after the filing of the notice of appeal, the appellant shall file a brief with the Board and serve a copy upon the other parties. Within 10 days after service of the appeal brief, a reply brief may be filed with the Board in which case a copy shall be served upon the other parties....Appeals may be dismissed by the Board on its own initiative or on motion of the other party, in cases where a

grant the motion.

The record establishes that respondent on September 17, 1993 filed a timely notice of appeal from the oral initial decision the law judge rendered on September 16.2 However, respondent did not file an appeal brief until September 23, one day past the five day filing deadline. In response to the motion to dismiss, the respondent, by counsel, suggests that he believed he had an additional day to file an appeal brief because he had filed the notice of appeal a day early. We find no justification for respondent's error, for the applicable rule clearly states that the time for filing an appeal brief is five days after the notice of appeal is filed, not five days after the last day it could have been filed. Thus, whether viewed as an error of computation (see, e.g., Administrator v. Royal American Airways, Inc., 5 NTSB 1089 (1986)(late notice of appeal), aff'd Royal American Airways, <u>Inc. v. FAA</u>, 9th Cir., No. 86-7512, April 29, 1987 and Administrator v. Beavers, NTSB Order EA-3359 (1991)(late appeal brief)) or of construction (see, e.g., Administrator v. Near, 5 NTSB 994 (1986) (Unfounded mistake as to filing requirement does not constitute good cause)), it does not appear that the lateness of the brief is excusable for good cause shown.

In the absence of good cause for respondent's noncompliance with the time limit for filing an appeal brief, dismissal of his appeal is required by Board precedent. See <u>Administrator v. Hooper</u>, NTSB Order No. EA-2781 (1988); <u>Administrator v. Kalko</u>, NTSB Order No. EA-3984 (served September 29, 1993). (..continued) party who has filed a notice of appeal fails to perfect his appeal by filing a timely brief...."

The law judge affirmed an emergency order of the Administrator revoking the respondent's commercial pilot certificate (No. 461458783) for his alleged violations of sections 91.409(a)(1), 91.413, 91.207(c), 91.7(a), 91.123(a), 91.13(a), and 45.21(b) of the Federal Aviation Regulations, 14 CFR Parts 91 and 45.

The Administrator has moved to amend his motion to dismiss in order to include a request that we overturn a procedural ruling in Administrator v. Ben-Hanania, NTSB Order No. EA-3540 (1992), a case the Administrator suggests could be viewed as inconsistent with the strict policy on dismissals set forth in Hooper. In Ben-Hanania we reached the merits of and denied an appeal whose appeal brief may have been filed late because we could "not tell from the record whether there [was] good cause to excuse the tardiness," and where, we believed, "the time constraints applicable to an emergency proceeding preclude[d] us...from ascertaining the answer to that question" (Id. at page 2, n. 4). We will grant the amendment, but see no need to overrule Ben-Hanania, for that case does not represent any

ACCORDINGLY, IT IS ORDERED THAT:

- 1. The Administrator's motion to dismiss is granted, and
- 2. The respondent's appeal is dismissed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above order.

(...continued)

departure from the dictates of <u>Hooper</u>, nor was it intended to. To the contrary, our ruling on the merits there was simply an attempt to avoid what might have been an erroneous procedural ruling that might have impaired our ability to enter a timely final decision. Our ruling in <u>Ben-Hanania</u> should not be construed as reflecting any willingness by the Board to *grant* an emergency appeal absent a showing of good cause for any notice of appeal or appeal brief that may have been filed out of time.